



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2019–0029; 4500030114]

RIN 1018–BD71

Endangered and Threatened Wildlife and Plants; Threatened Species Status for Graham’s Beardtongue (*Penstemon grahamii*) and White River Beardtongue (*Penstemon scariosus* var. *albifluvis*); Designation of Critical Habitat for Graham’s Beardtongue and White River Beardtongue

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment periods.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are reopening the comment periods on our August 6, 2013, proposed rules to list Graham’s beardtongue (*Penstemon grahamii*) and White River beardtongue (*Penstemon scariosus* var. *albifluvis*) as threatened species throughout their ranges and to designate critical habitat for these two plant species under the Endangered Species Act of 1973, as amended (Act). We are reopening the comment period for 30 days to give all interested parties further opportunity to comment on the proposed rules. Comments previously submitted need not be resubmitted as they are already incorporated into the public record and will be fully considered in the final rule.

DATES: The comment periods on the August 6, 2013, proposed rules (78 FR 47590 and 78 FR 47832) are reopened. We will accept comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER

PUBLICATION]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: *Document availability:* You may view the August 6, 2013, proposed rules and supporting materials associated with this reopened public comment period and described below under **SUPPLEMENTARY INFORMATION** at <http://www.regulations.gov> under Docket No. FWS–R6–ES–2013–0081 (for the proposed listing rule) or FWS–R6–ES–2013–0082 (for the proposed critical habitat rule), or from the office listed in **FOR FURTHER INFORMATION CONTACT**.

New information related to this proposed rule and described below in this document may be accessed at <http://www.regulations.gov> under Docket No. FWS–R6–ES–2019–0029.

Comment submission: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. In the Search box, enter FWS–R6–ES–2019–0029, which is the docket number for this proposed action. Then click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R6–ES–2019–0029; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We

will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Information Requested**, below, for more information).

FOR FURTHER INFORMATION CONTACT: Larry Crist, Field Supervisor, U.S. Fish and Wildlife Service, Utah Ecological Services Field Office, 2369 West Orton Circle, Suite 50, West Valley City, UT 84119; telephone 801-975-3330. Persons who use a telecommunications device for the deaf may call the Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

Species Information and Previous Federal Actions

Please refer to the August 6, 2013, proposed listing rule at 78 FR 47590 for information about Graham's beardtongue and White River beardtongue's taxonomy, description, distribution, habitat, and biology, as well as a detailed description of previous Federal actions concerning Graham's beardtongue and White River beardtongue prior to 2013.

On August 6, 2013, we published a proposed rule to list Graham's beardtongue and White River beardtongue as threatened species under the Act (78 FR 47590). We also published an August 6, 2013, proposed rule to designate critical habitat for both species (78 FR 47832). Upon publication of our proposed rules, we opened a 60-day comment period that closed on October 7, 2013. Following publication of our proposed rules, the same parties (Bureau of Land Management (BLM); U.S. Fish and Wildlife Service; Utah Department of Natural Resources; State of Utah School and Institutional

Trust Lands Administration (SITLA); Uintah County, Utah) that had drafted a 2007 Conservation Agreement (CA) for Graham's beardtongue and White River beardtongue reconvened to evaluate species' surveys and distribution information and reassess the conservation needs of both Graham's and White River beardtongues. Based on this evaluation, the parties completed a new conservation agreement (2014 CA, entire) that specifically addressed the threats identified in our August 6, 2013, proposed rule to list the two species (78 FR 47590). Additional signatories to the 2014 CA included the Utah Public Lands Policy Coordination Office (PLPCO) and Rio Blanco County, Colorado.

In the 2014 CA, the parties committed to conservation actions including establishing 17,957 hectares (ha) (44,373 acres (ac)) of occupied and unoccupied suitable habitat as protected conservation areas with limited surface disturbance and avoidance of Graham's and White River beardtongue plants by 91.4 meters (m) (300 feet (ft)). Additionally, BLM agreed to avoid surface disturbances within 91.4 m (300 ft) of Graham's and White River beardtongue plants within and outside of conservation areas on BLM land. The parties also developed conservation measures to address the cumulative impacts from livestock grazing, invasive weeds, small population sizes, and climate change by continuing species monitoring, monitoring climate, reducing impacts from grazing when and where detected, and controlling invasive weeds.

On May 6, 2014, we announced the reopening of the public comment period on our August 6, 2013, proposed listing and proposed designation of critical habitat rules until July 7, 2014 (79 FR 25806). In that document, we also announced the availability of a draft economic analysis (DEA), draft environmental assessment (EA), draft 2014 CA, and amended required determinations section of the proposal. We also announced

the availability of 2013 survey results for Graham's and White River beardtongue plants and our intent to hold a public information meeting and public hearing.

On August 6, 2014, we withdrew the proposed rule to list Graham's beardtongue and White River beardtongue as threatened species under the Act (79 FR 46042). This withdrawal was based on our conclusion that the threats to the species as identified in the proposed rule were no longer as significant as we previously determined. We based this conclusion on our analysis of new information concerning current and future threats and conservation efforts. As a result, we also withdrew our associated proposed rule to designate critical habitat for these species.

Litigation

On March 26, 2015, a complaint was filed in the District Court for the District of Colorado by Rocky Mountain Wild, Center for Biological Diversity, Utah Native Plant Society, Southern Utah Wilderness Alliance, Grand Canyon Trust, Western Resource Advocates, and Western Watersheds Project challenging the withdrawal of the proposal to list Graham's beardtongue and White River beardtongue. The State of Utah, SITLA and PLPCO, and Uintah County, Utah, intervened in the litigation. On October 25, 2016, the court found that the withdrawal was contrary to the Act because (1) we concluded that yet-to-be-enacted regulatory and non-regulatory measures mandated by the 2014 CA were "existing regulatory mechanisms"; (2) we failed to account for the 2014 CA's expiration when determining whether the beardtongues face material threats in the "foreseeable future"; and (3) we took into account economic considerations when imposing a 91.4-m (300-foot) buffer zone around each beardtongue. However, before

entering final judgment, the court ordered that the parties meet to discuss whether the 2014 CA could be modified in a manner satisfactory to Plaintiffs. Those meetings occurred, but in a December 15, 2017, Joint Status Report to the court, the parties reported that we were unsuccessful at reaching agreement. Therefore, on December 18, 2017, the court entered final judgment, vacating our August 6, 2014, withdrawal, and reinstating the proposed listing and critical habitat rules.

As a result, the August 6, 2013, proposed listing and critical habitat rules (collectively referred to as the 2013 proposed rules) for Graham's beardtongue and White River beardtongue are now reinstated, and both species are proposed species for the purposes of consultation under section 7 of the Act. This document notifies the public that we are reopening the comment periods on the 2013 proposed rules (78 FR 47590 and 78 FR 47832). We also announce that we will be reevaluating the status of both species to determine whether they meet the definition of endangered or threatened species under the Act, or whether they are not warranted for listing. Any listing determination we make must be made based on the best available information.

We invite the public to comment on the 2013 proposed rules, and we request new information regarding Graham's beardtongue and White River beardtongue that has become available since the publication of the proposed rules to inform this evaluation. As described in more detail below, new survey and monitoring information have become available to us since the publication of our 2013 proposed rules. In addition, we worked with partners to complete a final 2014 CA and 2018 addendum and modified conservation areas under the 2014 CA.

New Survey Information

In 2013, our range-wide population estimates for Graham’s beardtongue and White River beardtongue were 31,702 and 11,423, respectively, and all plants known at the time for the two species were included within our proposed critical habitat units. Since publication of our 2013 proposed rules, we have received additional survey information for Graham’s beardtongue and White River beardtongue that resulted in a larger total population size for the two species and a larger range for White River beardtongue. For Graham’s beardtongue, we now know of an additional 24,118 plants, which brings our 2018 range-wide population estimate to 55,820 plants. A total of 43,464 Graham’s beardtongue plants (78 percent of the total population) now occur inside of the August 6, 2013, proposed critical habitat units, an increase of 11,762 plants since 2013 (Table 1). A total of 28,085 Graham’s beardtongue plants (50 percent of the total population) now occur within designated conservation areas that were identified in the 2014 CA, an increase of 2,309 plants since 2014. Designated conservation areas are subject to surface disturbance caps for the duration of the 2014 CA. For more details on designated conservation areas, see the 2014 CA.

Table 1. Graham’s and White River beardtongues 2013 and 2018 plant abundance inside and outside of the 2013 proposed critical habitat (PCH) boundaries.

Year	Number of Plants	Graham’s Beardtongue (Percent of Total)	White River Beardtongue (Percent of Total)
2013	Inside 2013 PCH	31,702 (100%)	11,423 (100%)
	Outside of 2013 PCH	0 (0%)	0 (0%)
	TOTAL	31,702	11,423
2018	Inside 2013 PCH	43,464	19,194

		(78%)	(59%)
	Outside of 2013 PCH	12,356 (22%)	13,218 (41%)
	TOTAL	55,820	32,412

For White River beardtongue, we now know of an additional 20,989 plants, which brings our 2018 range-wide population estimate to 32,412 plants. Based on our updated understanding of the population and its distribution, a total of 19,194 plants (59 percent of the total population) occur inside of our proposed critical habitat. In addition, a total of 23,954 plants (74 percent of the total population) occur within designated conservation areas that were identified in the 2014 CA, an increase of 14,724 plants since 2014 (Table 1).

Maps of plant locations are available at <http://www.regulations.gov> under Docket No. FWS–R6–ES–2019–0029 and at <https://www.fws.gov/mountain-prairie/es/grahamsAndWhiteRiverBeardTongue.php> by clicking Recent Actions & Links at the bottom of the page. We request public comments on these data and how they should be considered for the designation of critical habitat, and how this information might impact our assessment of the species’ status under the Act.

New Monitoring Information

Since the publication of our 2013 proposed rules, we have received additional population monitoring information for Graham’s beardtongue and White River beardtongue in Utah and Colorado, and genetic studies of White River beardtongue. In addition, we convened an expert panel to discuss the amount of variation found in

Graham's beardtongue and White River beardtongue genetics and morphology across their ranges. Population trends for Graham's beardtongue and White River beardtongue are relatively stable to increasing at all monitoring locations with episodic recruitment offsetting declines due to herbivory (Reisor and McDonough 2014, pp. 22, 33; Pavlik *et al.* 2015, pp. 1–2; Conservation Team 2018, pp. 99–105; Dawson 2018, p. 3; Krening 2018a, pp. 1, 5; and Krening 2018b, p. 2). Long-term monitoring results provide additional confirmation that Graham's beardtongue plants remain dormant and below ground in years of adverse environmental conditions (Krening 2018a, p. 5; Dawson 2019, p. 1).

We are also aware that preliminary evaluations of the effect of disturbance from development on seed set and pollinator visitation are under way. Preliminary results are not conclusive (Barlow and Pavlik 2018, pp. 2–3; Conservation Team 2018, Appendix E).

Genetic studies of White River beardtongue have resolved our understanding of the species' range and extent, thus eliminating the uncertainty associated with the unverified element occurrences we referenced in our 2013 proposed rules (Stevens and Johnson 2016, entire; Rodriguez *et al.* 2018, entire). One remaining area of uncertainty regarding taxonomy is whether to elevate White River beardtongue to a species-level rank of *Penstemon albifluvis*. White River beardtongue is currently considered a subspecies (*Penstemon scariosus* var. *albifluvis*). Regardless, we consider it to be a listable entity. We held a meeting on June 2, 2017, with an expert panel to review and discuss the new genetic results and other pertinent information regarding the range of variation found in Graham's beardtongue and White River beardtongue. The additional

population monitoring, genetic studies, and expert panel information are available at <http://www.regulations.gov> under Docket No. FWS–R6–ES–2019–0029 and at <https://www.fws.gov/mountain-prairie/es/grahamsAndWhiteRiverBeardTongue.php> by clicking Recent Actions & Links at the bottom of the page. We request public comment on these data and how they might impact our assessment of the species’ status under the Act.

2014 Conservation Agreement and 2018 Addendum

We and the other parties to the conservation agreement finalized the 2014 CA on July 22, 2014. The 2014 CA is similar to the draft conservation agreement provided during the previous reopened public comment period for our 2013 proposed rules (79 FR 25806), and is described in our 2014 withdrawal. We and the other parties to the 2014 CA signed an addendum to the agreement in November and December 2018.

In the 2018 addendum, the Federal, State, and county parties agreed to a 5-year extension of the 2014 CA until July 25, 2034. The private parties in Utah will be released from the 2014 CA when the original term ends and when the Uinta County Ordinance (No. 7–16–2018 01) expires on July 25, 2029. Afterwards, private parties may voluntarily submit land to be incorporated as a conservation area under the 2014 CA.

The 2018 addendum includes a new commitment for our agency to complete an assessment of the species’ status on or around December 31, 2028, for Graham’s beardtongue and White River beardtongue, prior to the release of private parties in Utah from the 2014 CA. The purpose of this future assessment will be to characterize

Graham's and White River beardtongues' biological condition and viability within their respective ranges at that time. The assessment will likely include a projection of the beardtongues' future condition based on plausible scenario(s) and will characterize the uncertainty related to stressors and scenario(s).

The 2018 addendum also includes a new commitment for the parties to complete a summary report every 5 years. Summary reports will provide a comprehensive review of conservation efforts and research performed under the 2014 CA, as well as the status of the beardtongues and habitat conditions within conservation areas. The summary reports are intended to inform our 2028 species status assessment for the beardtongues and will also inform the parties of any conservation actions that would be beneficial to the species and could be implemented prior to the ending of the 2014 CA. The 2014 CA and the 2018 addendum are available at <http://www.regulations.gov> under Docket No. FWS-R6-ES-2019-0029 and at <https://www.fws.gov/mountain-prairie/es/grahamsAndWhiteRiverBeardTongue.php> by clicking Recent Actions & Links at the bottom of the page. We request public comment on this information and how it might impact our assessment of the two species' status under the Act.

2014 Conservation Agreement Conservation Area Modifications

Under section 6.2 of the 2014 CA, parties are required to review existing conservation area boundaries and discuss proposed modifications to these boundaries. The parties started their review on November 2, 2017, and finalized their modification of conservation area boundaries on November 20, 2018. The conservation boundary modification process included a review of new survey information, prioritization of

conservation areas based on biological factors, and boundary adjustments that reflected priority areas. The parties approved the inclusion of an additional 947 ha (2,339 ac) as new designated conservation areas for White River beardtongue habitat on BLM and SITLA lands. The parties also approved the removal of 46 ha (115 ac) from existing conservation areas. These areas were removed due to errors in the original Geographic Information System analysis, analyses that showed they contained lower value areas without plants, and existing development. The conservation area modification document is available at <http://www.regulations.gov> under Docket No. FWS–R6–ES–2019–0029 and at <https://www.fws.gov/mountain-prairie/es/grahamsAndWhiteRiverBeardTongue.php> by clicking Recent Actions & Links at the bottom of the page. We request public comment on this information and how it might impact our assessment of the two species’ status under the Act.

Information Requested

We will accept written comments and information during this reopened comment period on our proposed rule to list Graham’s beardtongue and White River beardtongue as threatened species that was published in the *Federal Register* on August 6, 2013 (78 FR 47590), and on our proposed rule to designate critical habitat for both species (78 FR 47832, August 6, 2013). We will also accept written comments and information regarding the new information described above, including new survey and monitoring information that have become available, the 2014 CA and 2018 addendum, and modification of conservation areas under the 2014 CA. We will consider information and recommendations from all interested parties. We are particularly interested in comments

concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of these species;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns; and

(d) Historical, current, and projected population levels and trends.

(2) The factors that are the basis for making a listing determination for a species

under section 4(a) of the Act (16 U.S.C. 1531 et seq.), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of these species, including the locations of any additional populations of these species.

(5) Past and ongoing conservation measures for these species, their habitats, or both.

(6) Current or planned activities in the areas occupied by these species and

possible impacts of these activities on these species.

(7) Any information on the biological or ecological requirements of these species and ongoing conservation measures for these species and their habitats.

(8) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 et seq.), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(9) Specific information on:

(a) The amount and distribution of Graham’s beardtongue and White River beardtongue occupied and suitable habitat;

(b) Areas that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species that should be included in the designation and why;

(c) What areas not occupied at the time of listing are essential for the conservation of the species and why;

(d) What may constitute “physical or biological features essential to the conservation of the species,” within the geographical range currently occupied by the species;

(e) Where the “physical or biological features essential to the conservation of the species,” features are currently found;

(f) Information indicating how these species respond to natural and anthropogenic disturbances; and

(g) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change.

(10) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(11) Information on the projected and reasonably likely impacts of climate change on Graham's and White River beardtongues and proposed critical habitat.

(12) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, we seek information on any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(13) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(14) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(15) The likelihood of adverse social reactions to the designation of critical habitat and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(16) Whether the 2014 CA, including the 2018 addendum and conservation area modifications, provides sufficient conservation measures to reduce threats to one or both

species.

As indicated under **SUMMARY**, above, if you submitted comments or information on the proposed rules (78 FR 47590 and 78 FR 47832) during the initial comment periods from August 6, 2013, to October 7, 2013, or from May 6, 2014, to July 7, 2014, please do not resubmit them. Any such comments are incorporated as part of the public record of this rulemaking proceeding, and we will fully consider them in the preparation of our final determination. Our final determination will take into consideration all written comments and any additional information we receive during all comment periods. The final decision may differ from the proposed rule, based on our review of all information received during this rulemaking proceeding.

You may submit your comments and materials concerning the proposed rules and other new information described above by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Utah Ecological Services Field Office (see **FOR FURTHER**

INFORMATION CONTACT).

References Cited

A complete list of references cited in this document is available on the Internet at *<http://www.regulations.gov>* at Docket No. FWS–R6–ES–2019–0029 and on our website at *<https://www.fws.gov/mountain-prairie/es/grahamsAndWhiteRiverBeardTongue.php>* by clicking Recent Actions & Links at the bottom of the page, and upon request from the Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are the staff members of the Mountain Prairie Regional Office and Utah Ecological Services Field Office.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 22, 2019

Signed: Margaret Everson

Principal Deputy Director,

U.S. Fish and Wildlife Service,

Exercising the Authority of the Director,

U.S. Fish and Wildlife Service.

Billing Code 4333–15

[FR Doc. 2019-19768 Filed: 9/11/2019 8:45 am; Publication Date: 9/12/2019]